sawmill must lead to the inference that the plaintiff's case was a rare and unfortunate exception.

Consequently I am unable to bring myself to make any adverse findings against the defendants in this case which would have the consequence of imposing some pecuniary liability upon them for the very serious injury which the plaintiff sustained in this tragic accident. Mercifully his hand has only been amputated just above the wrist and the other cases which have come up before this Court in the past few years has left me with the belief that it would not be too difficult to provide the plaintiff an artificial hand which should compensate very considerably for most of his disabilities.

The last observation which should be made about this case is that it is unfortunate that the plaintiff has been persuaded to make this claim at all when it should have been reasonably obvious that it was a non-starter. The real problem here was the penury of the kampong dwellers in this illegal settlement. Human calls of nature do not wait for Governments to function. Clean water is a birthright of every human-being as much as clean air. The Court was informed that sometime after the accident water supply has now been arranged for into this Kampong. It is a pity that it was not provided earlier. It is equally a pity that those whose duty it was to advise the plaintiff and the other Kampong dwellers who were concerned with this claim did not tell them that the plaintiff's search for justice was not in the defendant's pocket but in the other aspects of the social process.

This claim is therefore dismissed with costs.

Order accordingly.

Solicitors: *Lee & Cheah; Ong Ban Chai & Co.*

HAPPY SHOPPING PLAZA SDN. BHD. v. SUN PROPERTIES SDN. BHD. & ORS.

[O.C.J. (L.C. Vohrah J.) April 10, 1986]

[Kuala Lumpur – Originating Summons No. F. 175 of 1983]

Contract – Sale and purchase of shares – Deposit of M$1 million – Forfeiture of – Construction of sale and purchase agreement – Whether violation of s.75 of Contracts Act, 1950 – Whether forfeiture of deposit in terrorem – Contracts Act, 1950, s. 75 – R.H.C. 1980, O.5 r.4.

On May 11, 1981 the plaintiffs entered into a written agreement with the defendants for the purchase of all the shares belonging to the defendants in Loke Kee Development Sdn. Bhd. The plaintiffs paid M$1,000,000 as deposit under clause 1 of the agreement. However, the plaintiffs failed to pay the first instalment of M$4,000,000 as prescribed and the defendants' solicitors by a letter dated October 5, 1981 repudiated the agreement and forfeited the deposit. The defendants exercised their rights under clause 4 of the said agreement. The plaintiffs contended, *inter alia*, that the forfeiture of M$1,000,000 was illegal and null and void on the ground that clause 4 of the agreement was inoperative as being in contravention of section 75 of the Contracts Act, 1950 under which the defendants were only entitled to reasonable compensation for damages suffered, if any, as a result of the non-completion of the transaction. The defendant contended that the sum of M$1,000,000 was paid as a deposit and could be forfeited pursuant either to the express words "all sums thencetofore paid by the purchaser to the vendors" under clause 4 or to an implied term in the agreement.

Held: (1) the forfeiture was carried out and the agreement terminated under clause 4 of the agreement. Accordingly, it was not open to counsel for the defendants to argue that the right to forfeit could also be considered to have been an implied term in the agreement;

(2) the sum of $1,000,000 as stipulated in clause 1 of the agreement did not represent a deposit *simpliciter* but formed in fact part and parcel of a very much larger sum of $5,000,000 in another provision which was really a general forfeiture provision in the agreement *in terrorem*;

(3) this provision was thus *per se* the kind of stipulation by way of penalty envisaged by section 75 of the Contracts Act, 1950;

(4) therefore, the defendants were only entitled to obtain reasonable compensation within the limitations of this section;

(5) prayers 1 and 2 of the plaintiff's application would be allowed and reasonable compensation by way of compensation would be assessed at a later date in accordance with prayer 4.

Case referred to:

(1) *Linggi Plantations Ltd.* v. *Jagatheesan* [1972] 1 M.L.J. 89.

ORIGINATING SUMMONS.

C. V. Das (*K.S. Chang* with him) for the plaintiffs.

C. Abraham (*Y.M. Siew* with him) for the defendants.

Cur. Adv. Vult.

L.C. Vohrah J. : This is an application on the part of the plaintiff by way of an originating summons for the following prayers:

"(1) A Declaration that upon its true construction Clause 4 of the Sale Agreement dated the 11th day of May, 1981 is invalid and unenforceable as being in breach

and violation of Section 75 of the Contracts Act, 1950;

(2) Further, a Declaration that the forfeiture of the sum of One Million Ringgit (Ringgit 1,000,000/-) by the Defendants is illegal null and void;

(3) An Order for the refund of the sum of One Million Ringgit (Ringgit 1,000,000/-) with interest to the Plaintiff;

(4) An appropriate order for payment to the Defendants under Section 75 of the Contracts Act, 1950 of any reasonable compensation for damages suffered, if any, as a result of non-completion of the Contract by the Plaintiff;

(5) Such further or other relief;

(6) Costs."

It is essentially an application under Order 5 rule 4 of the Rules of the High Court 1980 for the construction of the terms of a written agreement in which there is no substantial dispute of fact.

On May 11, 1981 the plaintiff entered into a written agreement with the defendants for the purchase of all the shares belonging to the defendants in Loke Kee Development Sdn. Bhd. whose only asset is land held under Geran Nos. 5335 and 5336 for Lot Nos. 612 and 613 respectively, Section 56 in the Town of Kuala Lumpur and District of Wilayah Persekutuan. The relevant clauses of the agreement (See Exhibit 'LKK.1', Enclosure 1) for the purposes of this application provide:

"1. In consideration of the sum of Malaysian Ringgit One Million ($1,000,000/-) only now or heretofore paid to the Vendors by the Purchaser as deposit and towards account of the purchase price (the receipt whereof the Vendors hereby expressly acknowledge) the Vendors hereby sell and the Purchaser hereby purchase the said shares free from encumbrances at the total purchase price of Malaysian Ringgit Ten Million ($10,000,000/-) only.

2. The balance of the purchase price amounting to Malaysian Ringgit Nine Million ($9,000,000/-) only shall be paid by the Purchaser to the Vendors Solicitors Messrs Soo Thien Ming & Shahrizat, Advocates and Solicitors of Wisma Tek Lee, 2nd Floor, Jalan Tun Razak, Kuala Lumpur (hereinafter called 'the Vendors' Solicitors') in the manner hereunder set out:-

(i) On or before 3.10.81 .. $4,000,000.00
(ii) On or before 3.12.81 .. $5,000,000.00.

.....

4. It is hereby expressly agreed between the parties hereto that if the Purchaser fails to pay any of the instalments within the stipulated time as mentioned under Clause 2 hereof, the Vendors shall be entitled to forfeit all sums thencetofore paid by the Purchaser to the Vendors and whereupon this Agreement shall terminate and [be] of no further effect and neither party shall have any claim against the other.

.....

5. Time whenever mentioned in this Agreement shall be the essence of the contract."

The plaintiff failed to pay the first instalment of $4,000,000/- as prescribed and the defendants' solicitors by letter dated October 5, 1981 (See Exhibit 'LKK.3', Enclosure 1) repudiated the agreement and forfeited the sum of $1,000,000/- which had been paid under Clause 1 as follows:

"M/s Shook Lin & Bok 5th October, 1981.
Advocates & Solicitors,
21st Floor, Wisma MPI,
Jalan Raja Chulan,
Kuala Lumpur.

Dear Sirs,

Re: Sale of Shares in Loke Kee Development Sdn. Bhd.
Sale and Purchase Agreement dated 11th May, 1981.

We refer to the above matter.

2. We note that part of the balance of purchase price of $4,000,000/- which was due on 3rd October, 1981 was not deposited with us as solicitors for the Vendors on the said due date in accordance with Clause 2(i) of the above Agreement. As such, our clients now enforce Clause 4 of the above Agreement and forfeit all sums heretofore paid by your clients to our clients absolutely, whereupon the said Agreement shall be deemed to be terminated and be of no further effect.

3. Kindly acknowledge receipt of this letter by signing on the duplicate copy of this letter and returning same to us.

Yours faithfully,
Signed:

We acknowledge receipt of this letter
M/s Shook Lin & Bok."

Counsel for the plaintiff contends that the forfeiture of $1,000,000/- is illegal and null and void on the ground that Clause 4 is inoperative as being in contravention of section 75 of the Contracts Act, 1950 under which the defendants are only entitled to reasonable compensation for damages suffered, if any, as a result of the non-completion of the transaction. He further contends that the sum of $1,000,000/- does not represent a true deposit and invites the Court to consider the correspondence exchanged between the plaintiff's solicitors and the defendants' solicitors leading up to the conclusion of the agreement and to the receipts issued by the defendants' solicitors "as aids to determine the true character" of that payment.

Counsel for the defendants' reply, in brief, is that the sum of $1,000,000/- was paid as a deposit and can be forfeited pursuant either to the express words "all sums thencetofore paid by the Purchaser

to the Vendors" under Clause 4 or to an implied term in the agreement and objects to the admission of the precontract documents on the grounds, first, that there is no ambiguity in the expression "as deposit and towards account of the purchase price" and, secondly, that section 91 of the Evidence Act, 1950 operates to exclude such evidence as the terms of the agreement have been reduced into a formal document under advice of solicitors.

The authorities are clear that a deposit or earnest money is forfeitable. This is plain from the judgment of the Board in the Privy Council case of *Linggi Plantations Ltd.* v. *Jagatheesan*[1] where Lord Hailsham L.C. said at page 93 :

"There is in their Lordships' judgment no difference in this context between the expression 'deposit' and the expression 'earnest money.' In this context they are two words for the same thing, although in common modern English usage 'earnest money' has a slightly archaic ring. As Fry L.J. said in *Howe* v. *Smith* [(1884) 27 Ch.D. 89] at page 101:-

> 'It (*i.e.*, the deposit) is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract.'

It is worth pointing out that the contract in *Howe* v. *Smith* provided that the sum of £500 there in question was here paid 'as a deposit and in part payment of the purchase money' and Cotton L.J. at page 95 in referring to the judgment of James L.J. in *Ex parte Barrell* [(1875) L.R. 10 Ch. A. 512] said:

> 'What is the deposit? The deposit, as I understand ... is a guarantee that the contract shall be performed. If the sale goes on of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then ... he can have no right to recover the deposit.'

Or, more simply, in the words of Lord MacNaghten in *Soper* v. *Arnold* [(1889) 14 App. Cas. 429] at page 435 :

> 'Everybody knows what a deposit is ... The deposit serves two purposes – if the purchase is carried out it goes against the purchase money – but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.' "

The question I have to determine is the nature of the sum of $1,000,000/- which is described as having been paid "as deposit and towards account of the purchase price."

Datuk Kok Wee Kiat, an experienced conveyancing solicitor, called on behalf of the defendants, testified that in his legal vocabulary the expressions "earnest money" and "deposit" in sale and purchase agreements relating to land or shares are interchangeable and the purpose of moneys being paid as such is to show good faith or earnestness on the part of the person making the payment for the due performance of the agreement. He also testified that in the course of his practice he formed the view that a sum amounting to 10% of the purchase price, more or less, has been accepted as the sum permitted by law to be forfeitable deposit in compensation for non-performance.

As was stated by Lord Hailsham in the *Linggi* case "there is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land, and if the sale price is over $3,000,000 the deposit will be over $300,000." I think there can be no dispute, having regard to the general practice obtaining locally, of which I take judicial notice, that an amount of 10% of the purchase price paid as deposit by the purchaser is an acceptable amount for forfeiture on his failure to perform. *A fortiori*, a lesser sum paid as deposit must surely be permissible.

I come back to the facts of the case. The intimation in notice 'LKK.3' to the plaintiff in no uncertain terms is that the forfeiture was carried out and the agreement terminated under Clause 4 and, accordingly, I do not think it is open now to counsel for the defendants to argue that the right to forfeit the deposit can also be considered to have been an implied term in the agreement. The admitted facts clearly show otherwise.

I have therefore to turn to the express provisions of Clause 4. In my view, they purport to provide for the forfeiture of not only one definite sum but of actually two different sums depending upon when the plaintiff failed to perform. If it failed to make the first instalment of $4,000,000/- on or before October 3, 1981 the sum of $1,000,000/- paid over at the time of the agreement was purportedly forfeitable. However, if the first instalment was made within the stipulated time but there was failure to make the second and final instalment of $5,000,000/– on or before December 3, 1981 then both the sum of $1,000,000/- and the first instalment of $4,000,000/- totalling $5,000,000/- would then purportedly be forfeitable. The sum of $1,000,000/- as stipulated in Clause 1, therefore, does not represent a deposit *simpliciter* but forms in fact part and parcel of a

very much larger sum of $5,000,000/- in another provision which, in my view, is really a general forfeiture provision in the agreement *in terrorem*. This provision is thus *per se* the kind of stipulation by way of penalty envisaged by section 75 of the Contracts Act, 1950 which reads:-

"75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

It is plain, therefore, that the defendants are only entitled to obtain reasonable compensation within the limitations of this section. In the result, the invitation to look at the letters and other documents that were exchanged between the plaintiff's solicitors and the defendants' solicitors in order to ascertain the nature of the payment of $1,000,000/- requires no further consideration. I would, accordingly, make an order in terms of prayers 1 and 2 of the application and direct that reasonable compensation by way of damages be assessed at a later date in accordance with prayer 4. The plaintiff will be entitled to the costs of this application.

Order accordingly.

Solicitors: *Shook Lin & Bok; Soo Thien Ming & Shahrizat.*

RONALD QUAY SDN. BHD. v. MAHESWARY SDN. BHD.

[A.C.J. (Zakaria Yatim J.) May 13, 1986]

[Kuala Lumpur – Civil Suit No. C 1380 of 1984]

Practice and Procedure – Summary judgment – Bona fide and plausible counterclaim for amount greater than plaintiff's claim – Stay of execution pending trial of counterclaim – R.H.C. 1980, O. 14.

In this case the plaintiff's claim was for a sum of $116,635.71 being the amount due and owing from the defendant to the plaintiff for services rendered by the plaintiff to the defendant. The defendant admitted that the plaintiff rendered the services but it denied that it was indebted to the plaintiff in the sum claimed. It also made a counterclaim in the sum of $250,000.00 as damages, alleging that the plaintiff in breach of its contractual obligations, cancelled the advertisement without the consent of the defendant and the defendant suffered loss of sales and accruable profits. The Senior Assistant Registrar gave judgment for the plaintiff for the sum claimed but ordered stay of execution pending the trial of the counterclaim. The plaintiff appealed.

Held: (1) there was a *bona fide* and plausible counterclaim the amount of which was more than the plaintiff's claim. The counterclaim was plausible as it was reasonably possible for the defendant to succeed if the counterclaim was brought to trial. The counterclaim was also not frivolous;

(2) the Senior Assistant Registrar was right when he ordered a stay of execution pending the trial of the counterclaim.

Cases referred to:

(1) *Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267, 269.
(2) *Lee Guat Eng* v. *Seet Tiam Hock* [1974] 1 M.L.J. 178, 179.
(3) *Sheppards & Co.* v. *Wilkinson & Jarvis* (1889) 6 T.L.R. 13, C.A.

CIVIL SUIT.

C. Sri Kumar for the appellant.
Y. Sivaloganathan for the respondent.

Cur. Adv. Vult.

Zakaria Yatim J. : This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar delivered on October 11, 1984 ordering a stay of execution on the final judgment entered against the defendant pending the hearing and disposal of the defendant's counterclaim.

The plaintiff's claim was for a sum of $116,635.71 being the amount due and owing from the defendant to the plaintiff in respect of services rendered by the plaintiff to the defendant at the request of the defendant. The defendant in its statement of defence admitted that the plaintiff rendered the services but denied that it was indebted to the plaintiff in the sum claimed. The defendant also made a counterclaim alleging that the plaintiff, in breach of its contractual obligations, cancelled the advertisement without the consent of the defendant and the defendant suffered loss of sales and accruable profits. Accordingly, the defendant claimed $250,000.00 as damages in the counter-claim.

The plaintiff applied for summary judgment under Order 14, rule 1 of the Rules of the High Court, 1980 for the sum of $116,635.71. On October 11, 1984, the Senior Assistant Registrar, entered judgment in the said sum but allowed stay of execution pending the trial of the counterclaim.